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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-15-0607

James Lynn Canyon

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-00.889.60)

BURKE, Judge.

James Lynn Canyon appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief, challenging his January 22, 2001, guilty-plea convictions of third-degree burglary, first-degree

theft of property, second-degree theft of property, and the possession of a forged instrument and the resulting 20-year sentences, to be served concurrently. His filing fee was waived. Canyon did not directly appeal his convictions and sentences.

Canyon states that he mailed this, his first, Rule 32 petition on May 15, 2015. As his ground for relief, Canyon argued that the circuit court lacked jurisdiction to accept his guilty plea because, he argued, his constitutional right to be protected from double jeopardy was violated. Canyon contended that his charges and convictions of first-degree theft of property and second-degree theft of property arose from the same acts, facts, and circumstances. Specifically, he alleged that the thefts were of various property taken from the same victim during the same burglary. Canyon further argued that he was improperly convicted of the offense of first-degree theft of property and the lesser-included offense of second-degree theft of property.

The State filed a motion to dismiss, arguing that Canyon committed four separate offenses and that, therefore his claim lacked merit; the State argued that the pistol taken from the

victim's house was the basis for the second-degree-theft-of-property conviction and the other items, including knives, a video-cassette recorder, and a microwave, taken from the victim's home were the basis for the first-degree-theft-of-property charge. The State argued that the offenses were not lesser-included offenses and that the claim was not a jurisdictional one. The State also argued that Canyon's claim was precluded because it could have been, but was not, raised at trial or on appeal, Rule 32.2(a)(3) and (a)(5), Ala. R. Crim. P.; and that his petition was time-barred pursuant to Rule 32.2(c), Ala. R. Crim. P.

Thereafter, the circuit court issued an order finding that Canyon's claim lacked merit, that it was precluded by Rule 32.2(a)(3) and (5), and that it was time-barred by Rule 32.2(c).

On appeal, Canyon argues that his petition should not have been summarily dismissed because, he argues, the circuit court lacked jurisdiction over his case in that his right to be free from double jeopardy was violated when he was convicted of theft of property in the first degree and theft

of property in the second degree as a result of the same burglary.

"'[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu. Horn v. Dunn Brothers, Inc., 262 Ala. 404, 79 So. 2d 11 (1955).' Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)." Ex parte Kelley, [Ms. 1131451, November 6, 2015] ____ So. 3d ____, ____ (Ala. 2015). "Because this issue is jurisdictional in nature, we can review it at any time. See Nunn v. Baker, 518 So.2d 711, 712 (Ala. 1987)." Pender v. State 740 So. 2d 482, 484 (Ala. Crim. App. 1999).

"[T]his double jeopardy claim goes to the jurisdiction of the trial court to render judgment. In Ex parte McKelvey, 630 So.2d 56 (Ala. 1992), the Alabama Supreme Court examined the double jeopardy issue whether the imposition of separate sentences for convictions arising from the same act was improper under the ground specified in Rule 32.1(b): 'The court was without jurisdiction to render judgment or to impose sentence.' It stands to reason that if the double sentencing issue is cognizable, then a double conviction issue is cognizable. See also Salter v. State, 606 So. 2d 209 (Ala.Cr.App. 1992) (the appellant's failure to raise on direct appeal the claim that he was guilty of only one offense of possession instead of the two offenses for which he was convicted, arguing that his possession of the two controlled substances was simultaneous, did not bar consideration of that issue in a Rule 32 proceeding because that issue presents a jurisdictional claim, not barred by the

expiration of the Rule 32 limitations period because it falls within Rule 32.1(c), that is, '[t]he sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law'). Accordingly, we find that Rolling's double jeopardy/jurisdictional issue is not precluded by operation of the limitations period."

Rolling v. State, 673 So. 2d 812, 816 (Ala. Crim. App. 1995) (footnote omitted) (Rolling was convicted of the felony murder and reckless manslaughter of the same victim and was sentenced to concurrent terms of life imprisonment and 10 years' imprisonment, respectively, and was granted relief on Rule 32 petition.) In Salter v. State, 606 So. 2d 209 (Ala. Crim. App. 1992), this Court determined that Salter could raise in a Rule 32 petition his double-jeopardy claim although he had pleaded guilty because, as a jurisdictional matter, he could not be convicted twice of possession of controlled substances for possessing two different types of narcotics in a single point of control at a single time at a single place. See also Pardue v. State, 571 So. 2d 320, 329-30 (Ala. Crim. App. 1989), rev'd on other grounds, 571 So. 2d 333 (Ala. 1990) (Pardue was improperly convicted of first- and second-degree theft of property where the convictions were based on a single

theft of the same property stolen from the same victim in the same burglary).

We note that there was no impropriety as to Canyon's burglary conviction and one of the theft-of-property convictions. Because the circuit court imposed concurrent sentences of 20 years' imprisonment for Canyon's burglary conviction and his theft conviction, there was no double-jeopardy error.

"[T]he appellate courts of this state have consistently held that where a defendant is charged with both burglary and theft (or larceny) arising from a transaction that is the foundation for both charges, the defendant may receive only one punishment. Vason v. State, 574 So.2d 860, 863 (Ala. Crim. App. 1990) (holding that although the defendant could receive only one sentence for two offenses arising out of the same transaction, the defendant was properly convicted of both burglary and theft that arose from the same transaction); Ex parte Harmon, 543 So. 2d 716, 717 (Ala. 1988) (in which this Court reversed the Court of Criminal Appeals' holding that the defendant had not preserved for review the issue of his consecutive sentences for convictions of burglary and theft, and remanded the case to the Court of Criminal Appeals 'to determine whether [the defendant] was in fact subject to the imposition of separate sentences'); Gray v. State, 338 So. 2d 444 (Ala.Cr.App.), cert. denied, 338 So. 2d 445 (Ala. 1976); Wade v. State, 42 Ala. App. 400, 401, 166 So. 2d 739 (1964) (the Court of Appeals held that 'where the same transaction supports both grand larceny [now theft] and burglary, on conviction there can be but one punishment'); Wildman v. State, 42 Ala. App. 357, 165 So. 2d 396

(1963), writ denied, 276 Ala. 708, 165 So. 2d 403 (1964) (the Alabama Court of Appeals held that '[g]rand larceny and burglary are of the same kindred of crimes,' and that '[w]here the identical transaction is the foundation, a verdict of guilt of one excludes a like finding of the other'; modified on rehearing to hold that the statutory prohibition against double punishment does not forbid convictions for both charges and does not forbid concurrent sentences-only double punishment)."

Ex parte McKelvey, 630 So. 2d 56, 57-58 (Ala. 1992) (footnote omitted). See also Brown v. State, 821 So. 2d 219, 225 (Ala. Crim. App. 2000) ("A court may sentence a defendant for burglary and theft if the sentences are made concurrent, rather than consecutive.").

There was no dispute as to the facts supporting this claim. All of the items were taken from the same victim at the same time. The State argued that, because the pistol taken from the victim during the burglary was the basis for the second-degree-theft-of-property charge, while the other "specifically stated items" were the basis for the first-degree-theft-of-property charge, there was no double-jeopardy violation. (C. 52.) The circuit court then determined that Canyon's claim lacked merit and that it was precluded. Because Canyon's convictions of theft of property in the first degree and theft of property in the second degree violated double-

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jeopardy principles, we are reversing the circuit court's judgment and remanding this case to the circuit court to vacate one of those convictions and the accompanying sentence and enter a new judgment. Due return shall be made to this Court within 28 days of this decision.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Welch and Kellum, JJ., concur. Joiner, J., dissents , with opinion. Windom, P.J., joins in dissent.

JOINER, Judge, dissenting.

This Court's decision ostensibly granting James Lynn Canyon's Rule 32, Ala. R. Crim. P., petition for postconviction relief and remanding this case to the circuit court for that court to "vacate one of [his theft-of-property] convictions and the accompanying sentence" ___ So. 3d at ___, is, at this juncture, premature.

Here, as the main opinion explains, Canyon's Rule 32, Ala. Crim. P., petition was deemed filed on May 15, 2015; it challenged his January 22, 2001, guilty-plea convictions for third-degree burglary, see § 13A-7-7, Ala. Code 1975, first-degree theft of property, see § 13A-8-3, Ala. Code 1975, second-degree theft of property, see § 13A-8-4, Ala. Code 1975, and possession of a forged instrument, see § 13A-9-6, Ala. Code 1975, and his resulting concurrent sentences, as a habitual felony offender, of 20 years' imprisonment.¹

In his petition, Canyon alleged that the circuit court "committed a violation of double jeopardy standards" when it "accepted an illegal guilty plea where [first-degree theft of

¹As the main opinion notes, Canyon did not file a direct appeal of his conviction and sentence.

property] and [second-degree theft of property] are of the same criminal offense." (C. 22.) According to Canyon:

"On or about [April 11, 2000,] sometime between 10:00 p.m. [and] 1:00 a.m. I went to Mr. [Charles] Cash['s] house and broke in and stole a set of collector's knives [sic], a [video-cassette recorder], a check, some gun holsters, a weed eater, a microwave, a .357 pistol, some rods [and] reels, tackle box, and some boxes of ammunition, and a pillowcase. I broke in through the front door and started to look around. I took the items listed above and put them in the car. That was parked in the carport. ... I was in the house for about 15 or 20 minutes.

"....

"I accepted a plea deal by conditions of all charges in the indictment. I was only offered this deal upon taking all charges at once combined in the plea agreement. I signed the plea deal with the understanding as explained by counsel ... and then the court accepted the plea deal, and we talked back [and] forth, the judge and I with counsel. I was then sentenced to (20) years on each count to be run concurrent with each other."

(C. 34-35.) To support his allegation that his first-degree and second-degree-theft-of-property convictions arose from the same event, Canyon attached to his petition a copy of the four-count indictment charging him.

On November 23, 2015, the State filed a motion to dismiss. In its motion to dismiss, the State refuted Canyon's

allegation that the two theft offenses arose out of the same event. Specifically, the State alleged:

"As to each of the grounds cited by [Canyon] in his Petition claiming a conviction obtained by a violation of the protection against double jeopardy and lack of jurisdiction by the court to render judgment or impose sentence, both of said grounds, separately and severally, are without any basis in law or in fact due to the fact that [Canyon] committed, and entered pleas of guilty to, four separate substantive offenses, namely, Burglary 3rd Degree, Theft 1st Degree of specifically stated items, Theft 2nd Degree of a pistol, and Possession of a Forged Instrument, 2nd Degree. Pleas of guilty to each of the aforestated offenses are not mutually exclusive, nor are they alternative avernemtnts [sic] or charges. Rather, each offense stands on its own and is not part of any of the others. As a result thereof, such fail to provide a basis upon which to grant any relief to [Canyon]."

(C. 52 (emphasis added).) Additionally, the State alleged that Canyon's claim was precluded under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., and was time-barred under Rule 32.2(c), Ala. R. Crim. P.

On February 16, 2016, the circuit court issued an order summarily dismissing Canyon's petition under Rule 32.7(d), Ala. R. Crim. P., finding, in part:

"IT APPEARING TO THE COURT that, as to each of the grounds cited by [Canyon] in his Petition wherein he claims a conviction obtained by a violation of the protection against double jeopardy as well as a lack of jurisdiction by the Court to

render judgment or impose sentence, each of said grounds, separately and severally, [is] found by this Court to be without any basis in law or in fact, inasmuch as [Canyon] was charged with, and entered pleas of guilty to, four separate substantive offenses, to-wit: Burglary 3rd Degree, Theft 1st Degree of certain specified items, Theft 2nd Degree of a firearm, and Possession of a Forged Instrument, 2nd Degree, each of which charges stands on its own and is not a part of any of the other charges to which [Canyon] entered a plea of guilty; and, as a result thereof, such fail to provide any basis upon which to grant any relief to [Canyon]."

(C. 56-57.) Thereafter, Canyon filed a timely notice of appeal.

"On appeal, Canyon argues that his petition should not have been summarily dismissed because, he argues, the circuit court lacked jurisdiction over his case in that his right to be free from double jeopardy was violated when he was convicted of theft of property in the second degree and theft of property in the third degree as a result of the same burglary."

___ So. 3d at ___ (emphasis added). I agree.

As set out above, Canyon alleged in his Rule 32 petition that his guilty-plea convictions for both first-degree and second-degree theft of property violated double-jeopardy principles because, he said, both offenses arose from one event.

Canyon's claim, as set out in his petition, is jurisdictional, sufficiently pleaded, and, if true, entitles him to relief. Indeed, this Court has explained:

"This claim is jurisdictional; therefore, it is not precluded by any of the provisions in Rule 32.2. See Ex parte Benefield, 932 So. 2d 92 (Ala. 2005); Ex parte Robey, 920 So. 2d 1069 (Ala. 2004); and Young v. State, 892 So. 2d 988 (Ala. Crim. App. 2004).

"It is well settled that '[a] single crime cannot be divided into two or more offenses and thereby subject the perpetrator to multiple convictions for the same offense.' Ex parte Darby, 516 So. 2d 786, 787 (Ala. 1987). With respect to theft of property, this Court has held that '[t]he State cannot convert a single theft of various items of property stolen from the same victim in the same [transaction] into separate offenses by alleging the theft of different items in separate counts of the indictment.' Pardue v. State, 571 So. 2d 320, 330 (Ala. Crim. App. 1989), rev'd on other grounds, 571 So. 2d 333 (Ala. 1990)."

Lynch v. State, [Ms. CR-14-1582, June 3, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016).

Simply because Canyon has sufficiently pleaded a claim that is jurisdictional and, if true, entitles him to relief, however, does not mean that this Court should, on appeal from the summary dismissal of that claim, grant him his requested Rule 32 relief without requiring him to prove that claim at an evidentiary hearing.

I recognize, of course, that such an approach has, on occasion, been used by both this Court and the Alabama Supreme Court to relieve a petitioner of his burden of proof in a Rule 32 proceeding. See, e.g., Williams v. State, 104 So. 3d 254, 265-66 n.5 (Ala. Crim. App. 2012), and the cases cited therein. This approach, however, is used only when the facts underlying the claim are not in dispute and the petitioner would be wasting scarce judicial resources by presenting evidence "that has already been presented to a jury and that is already before this Court by way of judicial notice." Id. For example, in Lynch, this Court noted:

"'[I]t is unnecessary to remand this case to allow [Lynch] an opportunity to prove [his] double-jeopardy claim because the facts warranting relief on that claim are not in dispute.... [O]ur holding is not based on [Lynch's] mere allegations in [his] petition, but on the undisputed evidence present at [Lynch's] trial, of which this Court has taken judicial notice.... Therefore, as both this Court and the Alabama Supreme Court have done numerous times in the past when the record is clear on its facts that a Rule 32 petitioner is entitled to relief, we grant that relief, rather than waste scarce judicial resources to remand for [Lynch] to present evidence that has already been presented to a jury and that is already before this Court by way of judicial notice.'

"Williams[v. State], 104 So. 3d [254] at 265-66 n.5 [(Ala. Crim. App. 2012)]."

Lynch, ____ So. 3d at ____, n.3.

Here, unlike in other instances in which this Court has absolved a petitioner of his burden of proof in a Rule 32 proceeding, there is no record on direct appeal of which this Court may take judicial notice and the facts underlying Canyon's double-jeopardy claim are disputed by the State.²

This Court, by granting Canyon's request for postconviction relief solely on the allegations raised in his petition, absolves Canyon of his burden to prove that claim by a preponderance of the evidence. See Rule 32.3, Ala. R. Crim.

²The main opinion, in its procedural history of this case, indicates that "the State argued that the pistol taken from the victim's house was the basis for the second-degree-theft-of-property conviction and the other items ... taken from the victim's home were the basis for the first-degree-theft-of-property charge." ____ So. 3d at _____. This statement implies that the State concedes the facts underlying Canyon's double-jeopardy claim. I can find no such concession in the record on appeal. Indeed, as I have quoted above, the State, in its motion to dismiss, alleged that each offense was separate. Moreover, although Canyon attached a copy of his four-count indictment to his petition, that indictment does not indicate that the two theft offenses arose out of the same act. The indictment certainly does not indicate that the pistol and the other items taken by Canyon were taken from the victim's house. At most, the indictment demonstrates that the victim owned all the property that was taken by Canyon.

P. ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." (emphasis added)).

Here,

"[t]he circuit court summarily dismissed [Canyon's] Rule 32, Ala. R. Crim. P., petition on the pleadings. Rule 32.3, Ala. R. Crim. P., provides that '[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' Because the circuit court summarily dismissed [Canyon's] petition on the pleadings, [Canyon] has not had the opportunity to present evidence and has not met [his] burden of 'proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' In other words, although the 'assertions set forth in the majority's opinion, if true, [may] entitle [Canyon] to [relief], ... they are merely allegations.' Patrick v. State, 91 So. 3d [756] at 756 [(Ala. Crim. App. 2011)] (Welch, J., dissenting).

"Because [Canyon's] cause is before this Court to review the circuit court's action on [his] pleadings ..., I do not believe that it is appropriate for this Court to order the circuit court to vacate one of [Canyon's] convictions. In other words, this Court should not summarily grant relief based on a Rule 32 petitioner's pleadings. Instead, this Court should apply Rule 32.2, Ala. R. Crim. P., and remand the cause to the circuit court with instructions for it hold an evidentiary hearing or accept evidentiary submissions, thus providing [Canyon] with an opportunity to present evidence in an attempt to prove [his] claim. Rule 32.9, Ala. R. Crim. P."

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Williams, 104 So. 3d at 266-67 (Windom, P.J., dissenting).

Therefore, I respectfully dissent.

Windom, P.J., concurs.